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ALEXANDER L. STEVAS,
CLERK

No. 81-5698

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELMO PATRICK SONNIER,

Petitioner

vs.

STATE OF LOUISIANA,

Respondent

OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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QUESTIONS PRESENTED

I

Whether the state courts erred in holding that no constitutional violation occurred during a post-seizure search of the trunk and interior of a blue Dodge Dart automobile when the locked automobile itself had already been properly seized pursuant to a valid search warrant, following which a written consent to search the interior of said automobile was obtained from a woman bearing defendant's name and purporting to be his lawful wife, even though, in fact, there had been no lawful marriage?

II

Whether the Louisiana Supreme Court erred in affirming the death penalty after setting aside the jury's finding that the murders were "especially heinous and atrocious", although affirming the jury's findings of four other statutory aggravating cricumstances; viz., that the murders were committed while in the perpetration of aggravated kidnapping, aggravated burglary, and armed robbery, and created risk of death or great bodily harm to more than one person?

III

Whether the trial court in a capital case erred by failing sua sponte to provide detailed instructions to the jury concerning the effect and weight to be given to mitigating circumstances to be considered during the sentencing phase?

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STATEMENT OF THE CASE

1) Course of Proceedings and Disposition in State Courts.

The defendant herein, Elmo Patrick Sonnier, white male, age 27, was indicted jointly with his younger brother, Eddie James Sonnier, age 21, by an Iberia Parish Grand Jury on December 16, 1977. The two brothers were jointly indicted in a single indictment containing two separate counts. The first count alleged the first degree murder of Loretta Ann Bourque; the second count alleged the first degree murder of David LeBlanc--both crimes occurring on November 5, 1977.

Following a number of pre-trial motions, all of which are reflected in the record of trial, Elmo Patrick Sonnier withdrew an initial insanity plea and entered a plea of not guilty. The indictment was severed and prosecution proceeded against Elmo Patrick Sonnier first.

On April 15, 1978, the jury found defendant guilty as charged and recommended sentences of death on each of the two counts of first degree murder.

Sentences of death on each of the two counts of first degree murder were imposed on April 25, 1978 by the trial judge.

Upon appellate review, the Louisiana Supreme Court initially affirmed both the convictions and the sentence. Upon a rehearing, however, the Louisiana Supreme Court found error in the trial judge's instructions to the jury during the sentencing phase. The convictions were again affirmed, but the case was remanded to the trial court for a new hearing on the sentencing phase only before a new jury. State v. Elmo Patrick Sonnier, 379 So.2d 1336 (1979).

After a change of venue to St. Mary Parish, on March 26, 1980 the new jury returned recommendations of death on each count of first degree murder. The new jury found the existence of all five aggravating circumstances suggested by the State.

On April 11, 1980, the trial judge again sentenced defendant to death on each count of murder.

Upon appellate review, the Louisiana Supreme Court set aside one of the aggravating circumstances, but affirmed the remaining four aggravating circumstances and the death sentences. State v. Elmo Patrick Sonnier, 402 So.2d 650 (1981).

2) Synopsis of the facts of the case.

The evidence, as it developed at trial, revealed that on the night of November 4, 1977, two teenagers, David LeBlanc and Loretta Ann Bourque, had parked in a remote area of St. Martin Parish following a high school football game. They were accosted at about one a.m. by the two Sonnier brothers, Eddie James and Elmo Patrick, posing as police officers. The youngsters were handcuffed together at rifle-point and forced into the back seat of their own vehicle. The Sonnier brothers, with Elmo Patrick driving their victims' car, then drove some twenty-one miles through back roads to a remote oil field road in Iberia Parish, an area known to the defendant Elmo Patrick. The two youngsters were ordered out of the car and the boy was kept handcuffed while the girl was taken a short distance away where she was raped by both defendants.

Both Elmo Patrick Sonnier and his brother Eddie James testified for the defense, and each attempted to shift the blame

to the other for raping the girl and for actually firing the fatal shots. However, in response to defense counsel's questions on direct examination, Eddie James Sonnier did admit that he had convinced the girl to let him have intercourse with her after his brother, Elmo Patrick, had done so, this being a condition whereby the youngsters were to be released unharmed. Upon completion of the rapes the two youngsters were ordered to lie face down on the ground. According to his pre-trial confessions, Elmo Patrick Sonnier then fired three shots at close range into the head of each victim. (Transcript p. 1365-68, 1381, 1337-1339, 1387-1392, Exs. S-33, 35, 37) At trial, Elmo Patrick Sonnier recanted and testified that his pre-trial confessions (taped, oral and written) had been false and that he had taken the blame for doing the actual shooting in order to cover-up for his younger brother. Eddie Sonnier, called as defense witness, reiterated what both he and Elmo had said during their pre-trial confessions--viz., that Elmo Patrick Sonnier had fired all six fatal shots. Medical testimony was to the effect that any one of the six shots would have resulted in instantaneous death of the victim.

Prior to the second hearing on Elmo Patrick Sonnier's sentence, Eddie James Sonnier had himself been tried, convicted, and sentenced to death. Upon appeal, however, Eddie's death sentences had been reduced to life imprisonment. Freed from the threat of the death penalty, Eddie appeared as a defense witness at Elmo Patrick's rehearing on the sentence. Contrary to his previous testimony at his brother's trial on the merits, Eddie now assumed full responsibility for the killings, attempting to exonerate his brother Elmo Patrick. The defendant himself

now testified similarly to Eddie's new testimony. Both were impeached by their many previous statements to the contrary. Apparently, this new jury disbelieved this new testimony, since it too returned recommendations of death.

SUMMARY OF ARGUMENT

Respondent's ARGUMENT which follows is divided into three sections, each directed toward a specific QUESTION PRESENTED on page i of this brief.

1. Petitioner's objection to the search of the interior of the Dodge automobile after the vehicle had been properly seized under a valid search warrant is totally without merit. The car was properly seized as an instrumentality of the two murders, and careful examination of its exterior and interior after seizure was perfectly reasonable. Additionally, the police had obtained a valid written consent from Helen Sonnier, who purported to be defendant's wife. The fact that she was not legally married to defendant has no bearing on her apparent and actual authority to permit a search of property in her custody. Finally, nothing of critical significance was found during the search in question; so even assuming error, it was harmless.

2. The jury found five aggravating circumstances to support its recommendation for the death penalty. In view of Godfrey v. Georgia, ____ U. S. _____ , 100 S. Ct. 1759, 64 L.Ed. 2d 398 (1980), the Louisiana Supreme Court was constrained to set aside that aggravating circumstance that characterized defendant's crimes as "heinous and atrocious". This still left four perfectly valid aggravating circumstances to support the death penalty, when the statute requires only a single aggravating circumstance.

The characterization of defendant's crimes as "heinous and atrocious" did not result in the introduction of any improper evidence, nor did it prejudice defendant in any way. Therefore, setting aside that single aggravating circumstance should have no bearing upon the validity of the death penalty.

3. Defendant attacks the trial judge's instructions to the jury as being inadequate on the subject of weighing the mitigating factors. Not only was this alleged inadequacy not raised at trial, it was not briefed on appeal to the Louisiana Supreme Court, and should not be the basis for an application for a writ of certiorari to this Honorable Court. Tacon v. Arizona, 99 S.Ct. 998, 410 U.S. 351, 35 L.Ed. 2d 346 (1973). If this Honorable Court should choose to examine this issue, it is submitted that the instructions were fully adequate to guide the jurors in their important task.

ARGUMENT

I. The search of the Dodge automobile.

By focusing on the "common-law" relationship between defendant and Helen Sonnier, who gave the written consent to search the vehicle, defendant's application for the writ tends to distort the factual situation that confronted the Louisiana courts.

It should be noted at the outset here that defendant's original brief before the Louisiana Supreme Court abandoned any argument concerning the validity of the search warrant and the consent to search, but simply alleged that certain items not listed on the search warrant had been improperly seized during the subsequent search. Nevertheless, this brief will refer to all aspects of the issue under discussion.

The searches and seizures in question were based upon a search warrant (reproduced in defendant's petition at page 66a) and upon Helen Sonnier's written consent to search the entire premises and the automobile, such written consent having been given without knowledge that the officers also held a valid search warrant (Transcript p. 473, 491).

The search warrant itself orders the search of defendant's residence "and surrounding premises" and authorizes the seizure of a list of items, including an "early 1960's blue Dodge Dart automobile belonging to Elmo Patrick Sonnier" (Transcript p. 96, Ex. S-2). It follows that all items seized from the premises--including the Dodge Dart parked in the yard -- were properly acquired under the authority of a valid search warrant. In United States v. Napoli, 580 F.2d 1198 (5th Cir. 1976), cert. den. 97 S. Ct. 316, an authorization to search "premises" was held to extend to a vehicle on the premises.

The police having lawfully seized the Dodge Dart in its entirety as an instrumentality of the two murders, it would be absurd to require a second warrant simply to open the vehicle and examine its contents especially since the warrant authorized a search of "the premises". In Cooper v. California, 87 S. Ct. 788, 386 U.S. 58 (1967), this Honorable Court recognized that "lawful custody of an automobile does not of itself dispense with constitutional requirement of searches thereafter made of it." The Court went on, however, to point out that the reason for and the nature of the custody may constitutionally justify the search. The test is not whether it would have been reasonable to procure a second search warrant, but whether the subsequent search of the vehicle already lawfully seized by police was reasonable. As this Honorable Court said in Cooper, supra, "we cannot hold unreasonable under the Fourth Amendment, the search of a car validly held by officers for use as evidence" (in the present case, as an instrumentality of the two murders).

Even apart from the search warrant that authorized search of "the premises" and seizure of the blue Dodge Dart, the prosecution had the voluntary written consent of Helen Sonnier, who purported to be defendant's wife. She was in control of the entire premises, including the vehicle, and the officers had no reason to suspect that she was somehow excluded from custody of the vehicle at her doorstep. It is not unusual that a husband should have the keys to the family car on his person. In any event, the factual determination by the trial judge that Helen Sonnier did, in fact, have joint control over the premises, including the vehicle, is entitled to great weight on appeal. State v. Bartley, 329 So. 2d 431, 433 (1976). The Bartley case is also authority for the Louisiana rule that a "common-law"

marital relationship does not invalidate consent, the question of consent to search being a factual one for the trial judge.

It should be noted that the Louisiana Supreme Court disposed of the entire issue by simply declaring that "we have also carefully considered defendant's assignments of error Nos. 4...and find that none of these assignments of error present reversible error, nor do they any involve legal issues not governed by well established principles of law." State v. Elmo Patrick Sonnier, 379 So.2d 1336, 1356 (1980).

Assuming, solely for the purposes of this argument, that both searches of the Dodge Dart's interior somehow were invalid, it is submitted that no real harm to the defendant ensued. The only items offered and admitted into evidence that were taken from the automobile were a small brief case (S-25), a handcuff case (S-26), keys (S-27), and a red tablet with defendant's name on it (S-28). The briefcase (S-25) itself was of no significance except as a container for the other items. The handcuffs themselves (S-24), properly seized from the house, had already been admitted into evidence (Transcript 1284-1285). The red tablet with defendant's name on it (S-28) would establish defendant's connection with the Dodge Dart, but this had already been done more effectively by testimony that the automobile was parked next to his residence (Transcript p. 1280), and by defendant's confession (Ex. S-33), in which he admitted the ownership of the Dodge Dart. Thus, it is apparent from the record, that, even before the defense case was presented at trial (and during which all of the State's allegations concerning ownership of the foregoing items were confirmed), the introduction of State's Exhibits S-25 through S-28 was entirely cumulative. So even assuming error, it was harmless error. The

evidence of defendant's guilt is overwhelming. Not only did the jury have before it written and taped confessions to the murders, it had evidence of how defendant had re-enacted the murders in the presence of investigating officers. Additionally, the scientific evidence and the testimony of defendant's own brother, an accomplice and eye-witness to the murders, eliminated every possible doubt as to defendant's guilt of the two murders for which he was on trial. Harrington v. California, 395 U.S. 285, 89 S.Ct. 1720 (1969).

In Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), this Honorable Court, in considering the problem of harmless error, said:

> "The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of the inculpatory statement." 433 U.S. at p. 92

There is no reasonable possibility that the evidence complained of might have contributed to the conviction. Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972).

Defendant has failed to show that error was committed here, and, if committed, that it was prejudicial in the slightest. United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970) cert. den. 91 S.Ct. 1213, reh. den. 91 S.Ct. 1635.

II. The effect of setting aside one aggravating circumstance.

At the rehearing on the sentencing phase of the trial, the jury unanimously found the existence of five aggravating circumstances. Upon appeal, the Louisiana Supreme Court set aside the jury's finding that the murders had been committed in "an especially heinous, atrocious, or cruel manner". State v. Elmo Patrick Sonnier, 402 So.2d 650 (1981). This action was based upon the recent decision by the United States Supreme Court in Godfrey v. Georgia, _____ U.S. _____ , 100 S.Ct. 1759, 64 L.Ed 398 (1980), requiring detailed instructions to the jury on a proper and narrow interpretation of this particular aggravating circumstance. In the absence of such instruction in the present case, the Louisiana Supreme Court felt constrained to set aside the jury's finding that the two murders had been "heinous, atrocious, and cruel." The remaining four aggravating circumstances and the death penalty were affirmed by a unanimous court.

Defendant now asserts in his brief that the deletion of one of the five aggravating circumstances found by the jury demands that there be a second rehearing on the sentence. He refers to Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), wherein the Court of Appeals vacated a death sentence because one of several aggravating circumstances was set aside upon appeal. That case is presently before this Honorable Court sub nomine Zant v. Stephens, No. 81-89.

The State of Louisiana respectfully submits that the factual situation in Stephens v. Zant differs considerably from the present case, which should be easily and logically disposed of in favor of the State of Louisiana.

In Stephens, supra, the trial jury's consideration of an aggravating circumstance later held inadmissible on appeal may have caused the jury to be made aware of certain prejudicial information which otherwise may never have reached the jury. The impact of that information upon the sentencing decision may indeed be worthy of consideration.

In the present case, however, only one of five aggravating circumstances was set aside and there were no significant mitigating circumstances. The single aggravating circumstance set aside by the Louisiana Supreme Court on appeal did not concern a factual determination which, if erroneous, might have misled the jury, (e.g., that the victims were police officers, or that the killings were for profit.) Nor was otherwise inadmissible evidence presented to the jury. The aggravating circumstance that was set aside here was simply the jury's characterization of the defendant's conduct with reference to the crimes charged. All of this conduct was properly before the jury as evidence of the crimes themselves. Assuming that the jury erred in mislabelling the conduct as "heinous and atrocious", that error did not change the evidence nor did it introduce an element of prejudice into the proceedings. The jurors' collective judgment of defendant's conduct and the punishment merited thereby would have been exactly the same had they not been asked to characterize his conduct while recommending an appropriate penalty.

Under the circumstances of this particular case, any error in labelling defendant's conduct as "heinous and atrocious" (assuming this to have been an error), could not have had the slightest impact upon the jury's recommendation for the death penalty. Wainwright v. Sykes, supra. The recommendation for the death penalty was not "influenced by passion, prejudice or any other arbitrary factor."

The United States Court of Appeals, for the Fifth Circuit recently considered much the same problem on a habeas corpus petition in Williams v. Blackburn, _____ F.2d _____, June 18, 1981; holding inter alia that only one aggravating circumstance was necessary to uphold the death penalty, it being of no significance that another finding of "heinous and atrocious" circumstances had to be set aside. It is interesting to note that the same case, sub nomine Williams v. Louisiana, _____ U.S. _____ , 101 S.Ct. 899, 66 L.Ed.2d 828 (1981) had been denied certiorari by the United States Supreme Court during the direct appellate processes.

III. The adequacy of the trial court's instructions.

This particular issue was never raised in the courts below, except perhaps obliquely through a requested defense instruction (see page 86 of defendant's brief), which was rejected by the trial judge and found palpably erroneous by the appellate court (State v. Sonnier, at page 50a of defendant's brief).

Certainly it is the trial court's duty to explain the law to the jury, but when an instruction is neither challenged nor requested, the trial court should not be reversed except for plain error in giving or omitting instructions. United States v. Wentland, 582 F. 2d 1022, (5th Circ. 1978) cert. den. 99 S.Ct. 105 6. The mere submission of a requested instruction does not satisfy the requirement, necessary for preserving the objection for review, that the defendant indicate specifically why the court's instructions are erroneous and what should be done to conform such instructions to the law.

In the present case, defendant did not object to the instructions given at trial, but now attacks them as failing to provide the jury with "guidance as to the finding and effect of a mitigating circumstance." The exact instruction given on this matter by the trial judge is set out at page 12 of defendant's brief.

Defendant's brief seizes upon the language of Proffitt v. Florida, 428 U.S. 242, 248-249, 96 S.Ct. 2960, 2965 (1976) which refers to "weighing" the aggravating circumstances against the mitigating circumstances. Defendant suggests that the Florida procedures approved by this Honorable Court in Proffitt, supra, are somehow more precise and conducive to due process than the Louisiana terminology wherein the jury was instructed to "consider"

a specific list of mitigating circumstances as well as "to consider any other relevant mitigating circumstances".

The State of Louisiana respectfully submits that there are some things that cannot be reduced to precise mathematical equations. The difference between the Florida statute approved in Proffitt, supra, and the trial court's instructions in this case is basically one of semantics not of principle. The overridingly important fact in this case is that the instructions here, taken as a whole, informed the jury that it did not have to impose the death penalty, even if an aggravating circumstance were found. The jury was further told that it was required to consider a list of specifically named mitigating circumstances, and was authorized to consider "any other relevant mitigating circumstances." The existence vel non of any aggravating or mitigating circumstances was left to the good judgment of the jury, subject, of course, to appellate review.

The State of Louisiana respectfully submits that the jury instructions on mitigating circumstances, taken as a whole (and to which defense counsel did not object), Wainwright v. Sykes, supra, fully and fairly explained the jury's responsibilities concerning its sentence recommendation.

See also Williams v. Blackburn, supra, on the adequacy of instructions.

CONCLUSION

The first and third QUESTIONS PRESENTED raise no substantial issue not already decided by this Honorable Court. The trial court and the Louisiana Supreme Court correctly applied well-established principles of constitutional law to the factual circumstances of this particular case.

The second QUESTION PRESENTED concerns the effect of setting aside one of five aggravating circumstances found by the jury in support of the death penalty. Although never expressly decided by this Honorable Court, it is respectfully submitted that Respondent's Argument herein compels the conclusion that, under the facts of this case, certiorari should be denied. Recognizing that denial of certiorari is not necessarily legally significant, Respondent does note, however, that this Honorable Court has previously denied certiorari under an almost identical situation in Williams v. Louisiana, supra.

It is respectfully submitted that the state courts below fully considered and correctly applied existing federal constitutional law to the facts of this case. It if further respectfully submitted that petitioner's application for the writ of certiorari should be denied.

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